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09/746,888	12/22/2000	David John Tyrrell	16,497	9433

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KIMBERLY-CLARK WORLDWIDE, INC.
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EXAMINER

WEBB, JAMISUE A

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 24

Application Number: 09/746,888
Filing Date: December 22, 2000
Appellant(s): TYRRELL ET AL.

Alyssa A Dudkowski
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 2/20/03.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1-7, 10-34, 37-41, 43, 45-47 and 49-57 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

6,238,682	KLOFTA ET AL.	5-2001
6,316,030	KROPF ET AL.	11-2001

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Appellant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).
3. Claims 1-7, 10-13, 16-20, 40, 41, 43, 45-47, 49, 50, and 52-57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Krzysik et al. (6,149,934) in view of Klofta et al. (6,238,682).
4. With respect to Claims 1, 2, 20, 22-25, 40, 41, 53, and 55-57: Krzysik discloses the use of an absorbent article (20) with a topsheet, backsheet and core located there between (See Figure 1). Krzysik discloses the use of a lotioned topsheet to where the lotion composition is melted,

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applied to the topsheet and then cooled (column 13, line 64 to column 14, line 3). Krzysik discloses the use of a lotion composition on the topsheet that is melting temperature between 30-100 degrees Celsius (column 12, lines 31-34), a low sheer viscosity between 50000-80000 cP, a high sheet viscosity of 150-200 cP (column 12, lines 42-60), a penetration hardness between 5-360 mm (column 12, lines 66-67) disposed on the topsheet from 1-50 gsm (column 13, lines 44-49). Krzysik however does not disclose a lotion composition with a hydrophilic solvent, a high molecular weight polyethylene glycol, a fatty acid, a fatty alcohol and an extracted botanical active.

5. Klofta discloses a lotion composition with a 5-60% hydrophilic solvent (column 5, lines 6-8), a high molecular weight polyethylene glycol (column 10, line 9-10), 0.1-60% skin conditioning agent, such as fatty alcohols and fatty acids (column 18, line 10 to column 19, line 24), and a botanical active from 0.1-6% (column 16, lines 31-67). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the composition of Krzysik to be the composition of Klofta, in order to provide a lotion composition that kills viruses and imparts a soft lubricious feel. (see Klofta, abstract).

6. With respect to Claims 3 and 45: See Klofta, column 17, lines 13-42.

7. With respect to Claims 4, 5 and 46: See Klofta, column 17, lines 23-35.

8. With respect to Claims 6 and 47: See Klofta, column 24, lines 11-14.

9. With respect to Claim 7: See Klofta column 16, lines 31-42.

10. With respect to Claims 10, 11, and 49: Klofta discloses the use of a surfactant with an HLB value of greater than 7 (column 21, lines 12-14), but fails to disclose the use of glycerol stearate, polysorbate or water dispersible metal salts. It would have been an obvious matter of

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design choice to have the surfactant be either stearate, polysorbate or a water dispersible metal salt, since it has not been disclosed that the use of either stearate, polysorbate or a water dispersible metal salt solves any stated problem or is for any particular purpose and it appears that the invention would work equally as well with the surfactants of Klofta.

11. With respect to Claims 12, 13, 50: See Klofta column 27, lines 30-37.

12. With respect to Claims 16, 17, and 52: See Klofta column 18, line 10-12.

13. With respect to Claims 18, 19, and 53: See Klofta column 24, lines 30-40.

14. With respect to Claim 43: See Krzysik column 13, line 59.

15. Claims 14, 15, 21-39, and 51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Krzysik in view of Klofta as applied to Claims 1 and 40 above, and further in view of Kropf et al. (6,316,030).

16. With respect to Claim 14, 15, 21, 39 and 51: Krzysik and Klofta, as disclosed above for Claim 1, fails to disclose the composition comprising a sterol. Kropf discloses the use of a composition that contains an effective amount, 0.1-5% sterol (see abstract and column 3, line 35-32). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the composition of Krzysik and Klofta, to include the sterol of Kropf, in order to provide a caring and protective effect and increase skin moisture level (see Kropf column 1).

17. With respect to Claim 32: See Kropf column 2, lines 5-38.

18. With respect to Claim 26: See Klofta, column 17, lines 13-42.

19. With respect to Claims 27 and 28: See Klofta, column 17, lines 23-35.

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20. With respect to Claim 29: See Klofta, column 24, lines 11-14.
 21. With respect to Claim 34: See Klofta column 16, lines 31-42.
 22. With respect to Claim 30: Klofta discloses the use of a surfactant with an HLB value of greater than 7 (column 21, lines 12-14), but fails to disclose the use of glycerol stearate, polysorbate or water dispersible metal salts. It would have been an obvious matter of design choice to have the surfactant be either stearate, polysorbate or a water dispersible metal salt, since it has not been disclosed that the use of either stearate, polysorbate or a water dispersible metal salt solves any stated problem or is for any particular purpose and it appears that the invention would work equally as well with the surfactants of Klofta.
 23. With respect to Claim 31: See Klofta column 27, lines 30-37.
 24. With respect to Claim 33: See Klofta column 18, line 10-12.
- With respect to Claims 37 and 38: See Klofta column 24, lines 30-40.

(11) *Response to Argument*

With respect to appellant's argument that the examiner has failed to identify the motivation in the Krzysik patent for modifying its teachings with the teaching of the Klofta reference: The appellant's argue that the examiner does not adequately state why one of ordinary skill would select particular compounds to arrive at the composition of the claimed invention, however as stated in final office action, the examiner is not picking and choosing particular compounds of Klofta and adding them to the lotion of Krzysik, the examiner is replacing the entire lotion composition of Krzysik with the entire lotion composition of Klofta. The Klofta reference does have more components than the claimed invention, however the claims are open

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ended, and therefore allow additional components to be present. The examiner is not merely picking and choosing components of the lotion composition of Klotz, the examiner is using the entire composition of Klotz, which includes the natural antibacterial active. Klotz discloses the lotion being used to reduce skin irritation, therefore the motivation to replace the composition of the Krzysik patent with the entire composition of Klotz, relies in the fact that the lotion of Klotz is used to reduce skin irritation.

With respect to appellant's arguments that there is no motivation to combine the teachings of Krzysik, Klotz and Kropf patents: The appellant is once again arguing that one of ordinary skill in the art would not pick and choose the component out of the Kropf patent to arrive at the claimed invention. However, the Kropf patent deals with using a sterol in a lotion composition, such as a cream, lotion or emollient (column 3, lines 35-36). Kropf discloses the use of a sterol being used in a lotion composition, Klotz is a lotion composition, therefore one would find it obvious to add the sterol into the lotion of Klotz. Klotz discloses the lotion composition being used to reduce skin irritation, and Krzysik discloses the use of a skin care composition, which is a lotion applied to the topsheet, therefore it would be obvious to replace one lotion composition with another.

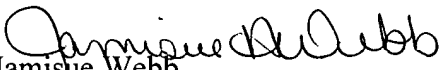
With respect to appellant's arguments there is not a reasonable expectation of success: As stated above, there is motivation to combine the Krzysik, Klotz, and Kropf references, and the examiner is not merely picking and choosing components from each one, but replacing the entire composition of Krzysik with the entire composition of Klotz, then adding the sterol of Kropf, if all the active ingredients of the combination of Klotz and Kropf are the same as the claimed

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invention, and if they are both used for skin care lotions, then it would inherently have the same effect as the claimed invention, and therefore have a reasonable expectation of success.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Jamisue Webb
May 13, 2003

Conferees

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